

11/24/83
#0222

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

IN THE MATTER OF:)

D.C. Franche Site)
Chicago, Illinois)

Settling Respondent)

Wabansia Corporation)

UNDER THE AUTHORITY OF THE)
COMPREHENSIVE ENVIRONMENTAL)
RESPONSE, COMPENSATION, AND)
LIABILITY ACT OF 1980, 42 U.S.C.)
§ 9601, et seq., as amended.)

Docket No.

V-W-96-G-352

AGREEMENT AND COVENANT NOT TO SUE

I. INTRODUCTION

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States Environmental Protection Agency ("EPA") and Wabansia Corporation ("Wabansia") (collectively, the "Parties").

EPA enters into this Agreement pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq.

EPA conducted an emergency removal action, pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, from June through November 1995, at the D.C. Franche Site, located at 1401 West Wabansia Avenue, Chicago, Illinois (the "Site"). The Site includes a two-story building of approximately 10,000 square feet and an attached single-story addition of approximately 8,800 square feet. EPA removed and disposed approximately 1000 drums

of hazardous substances associated with a former paint manufacturer that operated at the Site.

Wabansia ("Settling Respondent"), an Illinois corporation located at 1401 West Wabansia Avenue, Chicago, Illinois, wishes to purchase the Site and develop the building space for use by commercial tenants.

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections VII, VIII, IX, and X, the potential liability of the Settling Respondent for any Existing Contamination at the Site which would otherwise result from Settling Respondent becoming the owner of the Site.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA of a substantial benefit, is in the public interest.

II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

2. "Existing Contamination" shall mean any hazardous substances, pollutants or contaminants, present or existing on or under the Site as of the effective date of this Agreement.

3. "Parties" shall mean EPA and the Settling Respondent.

4. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901, et seq. (also known as the Resource Conservation and Recovery Act).

5. "Settling Respondent" shall mean Wabansia Corporation and its officers, directors, and shareholders when acting in those respective capacities.

6. "Site" shall mean the D.C. Franche Site, encompassing a warehouse located at 1401 West Wabansia Avenue in the City of Chicago, Cook County, Illinois, and set forth in the legal description attached as Exhibit 1 (hereinafter the "Site Property"). The Site shall include the Site Property and all areas at which Existing Contamination ultimately comes to be located.

7. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

III. STATEMENT OF FACTS

8. On June 13, 1995, EPA initiated a removal action at the Site. During EPA's removal action, the contents of approximately 1000 drums were analyzed, hazardous material was consolidated for

disposal, and all drums and hazardous material were disposed of at off-site facilities.

9. EPA completed the removal action in November 1995. EPA's removal action addressed all hazardous substances at the Site Property and decontaminated the Site Property to allow redevelopment.

10. The Settling Respondent intends to perform the following development activities at the Site Property: Settling Respondent will purchase the outstanding mortgage balance, foreclose on the mortgage, and take title to the Site Property; the Site building will be repaired and subdivided into four areas; Settling Respondent anticipates leasing portions of the building to commercial tenants.

11. The Settling Respondent represents, and for the purposes of this Agreement EPA relies on those representations, that Settling Respondent's involvement with the Site has been limited to the following: settlement negotiations with the bank that holds a mortgage on the Site Property; performance of a Phase I Environmental Assessment at the Site Property; performance of a Phase II Environmental Assessment at the Site Property; and assistance with EPA's removal action by identifying material suitable for use by other manufacturers.

IV. PAYMENT

12. In consideration of and in exchange for the United States' Covenant Not to Sue in Section VIII herein, Settling Respondent agrees to pay to EPA the sum of thirty-five thousand

dollars (\$35,000.00), within thirty (30) days after the date upon which Settling Respondent acquires title to the Site Property. The Settling Respondent shall make all payments required by this Agreement in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," referencing the EPA Region, EPA Docket number, and Site/Spill Identification No. 050Z, DOJ case number 90-11-2-1143, and the name and address of Settling Respondent. Settling Respondent shall remit payment to the following address:

U.S. Environmental Protection Agency
Superfund Accounting
P.O. Box 70753
Chicago, Illinois 60673

Notice of payment shall be sent to those persons listed in Section XV (Notices and Submissions).

13. Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

14. Commencing upon the date that it acquires title to the Site Property, Settling Respondent agrees to provide to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight, an irrevocable right of access at all reasonable times to the Site Property and to any other property to which access is required for the implementation of response actions at the Site, to the

extent access to such other property is controlled by the Settling Respondent, for the purposes of performing and overseeing response actions at the Site under federal law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of response actions to be undertaken at the Site Property. EPA agrees to use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry. Notwithstanding any provision of this Section, EPA retains all of its authorities and rights to gain access to the Site Property, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulation, including any amendments thereto.

15. Within thirty (30) days after the date upon which Settling Respondent acquires title to the Site Property, the Settling Respondent shall record a certified copy of this Agreement with the Cook County Recorder's Office, State of Illinois. Thereafter, each deed, title, or other instrument conveying an interest in the Site Property by the Settling Respondent shall contain the following notice:

This Property is subject to an Agreement and Covenant Not to Sue between Wabansia Corporation [or its assignees or successor in interest] and the United States Environmental Protection Agency. A certified copy of this Agreement is on file with the Cook County Recorder's Office, State of Illinois.

16. The Settling Respondent shall provide a copy of this Agreement to any current lessee or sublessee on the Site Property as of the effective date of this Agreement, and shall attach a copy of this Agreement to any subsequent lease, sublease,

assignment or transfer of the Site Property or an interest in the Site Property entered into by the Settling Respondent.

VI. DUE CARE/COOPERATION

17. The Settling Respondent shall exercise due care at the Site Property with respect to any Existing Contamination and shall comply with all applicable local, State, and federal laws and regulations. The Settling Respondent recognizes that the implementation of response actions at the Site may interfere with the Settling Respondent's use of the Site Property, and may require closure of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry and response. In the event the Settling Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site Property that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such release

or threatened release.

VII. CERTIFICATION

18. By entering into this Agreement, the Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Settling Respondent and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification to enter into this Agreement. The Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States determines that information provided by Settling Respondent is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States reserves all rights it may have.

VIII. UNITED STATES' COVENANT NOT TO SUE

19. Subject to Section IX (Reservation of Rights) and Section XI (Parties Bound/Transfer of the Covenant) of this Agreement, upon payment of the amount specified in Section IV (Payment), the United States covenants not to sue or take any other civil or administrative action for any and all civil liability for injunctive relief or reimbursement of response

costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a), or Section 7003 of RCRA, 42 U.S.C. § 6973, against Settling Respondent, its lessees or sublessees, and subsequent assignees, transferees, lessees, and sublessees for: (i) all response costs incurred or response actions taken by the United States with respect to the Site prior to the effective date of this Agreement and (ii) all response actions to be taken or response costs to be incurred by the United States with respect to any Existing Contamination after the effective date of this Agreement.

IX. RESERVATION OF RIGHTS

20. The covenant not to sue set forth in Section VIII above does not pertain to any matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue). The United States reserves and the Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Respondent to meet a requirement of this Agreement, including but not limited to Section IV (Payment), Section V (Access/Notice to Successors in Interest), Section VI (Due Care/Cooperation), and Section XIV (Payment of Costs);

(b) any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors, assignees, lessees or sublessees;

(c) any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;

(d) criminal liability;

(e) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA; and

(f) liability for violations of local, State or federal law or regulations.

21. With respect to any claim or cause of action asserted by the United States alleging a release or threat of release of hazardous substances, pollutants, or contaminants at the Site after the effective date of this Agreement and not within the definition of Existing Contamination, the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

22. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, or corporation, other than the Settling Respondent, its lessees or sublessees, and subsequent assignees, transferees, lessees, and sublessees that comply with Paragraph 29 of this

Agreement.

23. Nothing in this Agreement is intended to limit the right of EPA to undertake future response actions at the Site or to seek to compel parties other than the Settling Respondent, its lessees or sublessees, and subsequent assignees, transferees, lessees, and sublessees that comply with Paragraph 29 of this Agreement, to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA in exercising its authority under federal law. Settling Respondent acknowledges that it is purchasing property where response actions may be required.

X. SETTLING RESPONDENT'S COVENANT NOT TO SUE

24. In consideration of the United States' Covenant Not To Sue in Section VIII of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States, its authorized officers, employees, or representatives with respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the

Site, including claims based on EPA's oversight of such activities or approval of plans for such activities.

25. The Settling Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of the Settling Respondent's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XI. PARTIES BOUND/TRANSFER OF COVENANT

26. This Agreement shall apply to and be binding upon the United States and shall apply to and be binding on the Settling Respondent, its officers, directors, shareholders, employees, and agents. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

27. All of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement may be assigned or transferred to any person who complies with Paragraph 29.

28. In the event of an assignment, transfer, lease, or sublease of the Site Property or an assignment or transfer of an interest in the Site Property, the assignor, transferor, lessor, or sublessor shall continue to be bound by all the terms and

conditions, and subject to all the benefits, of this Agreement, except as EPA and the assignor, transferor, lessor, or sublessor agree otherwise and modify this Agreement, in writing, accordingly.

29. Prior to or simultaneous with any assignment or transfer of the Site Property, the assignee or transferee must provide notice of the transaction to EPA in which it consents in writing to assume all responsibilities of the Settling Respondent under this Agreement, including but not limited to, Section V (Access/Notice to Successors in Interest), Section VI (Due Care/Cooperation), and Section VII (Certification) in order for the benefits of this Agreement, including but not limited to the Covenant Not to Sue in Section VIII, to be available to that party. No additional payment under Paragraph 12 is necessary to obtain the benefits of this Agreement, including but not limited to the Covenant Not to Sue in Section VIII. The benefits of this Agreement, including but not limited to the Covenant Not To Sue in Section VIII, shall not be effective with respect to any assignee or transferee that fails to provide such written consent to EPA. Moreover, the benefits of this Agreement, including but not limited to the Covenant Not to Sue in Section VIII, shall not be effective with respect to any assignee, transferee, lessee, or sublessee who was, at any time prior to the effective date of this Agreement, in the category of persons described in Section 107(a)(1)-(4) of CERCLA, 42 U.S.C. § 9607(a)(1)-(4), with respect to the Site Property.

XII. DISCLAIMER

30. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by contamination at the Site nor constitutes any representation by EPA that the Site is fit for any particular purpose.

XIII. DOCUMENT RETENTION

31. The Settling Respondent agrees to retain and make available to EPA all business and operating records, contracts, site studies and investigations, and documents relating to operations at the Site, for at least three years, following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of three years, the Settling Respondent shall notify EPA of the location of such documents and shall provide EPA with an opportunity to copy any documents at the expense of EPA.

XIV. PAYMENT OF COSTS

32. If the Settling Respondent fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Payment), it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

XV. NOTICES AND SUBMISSIONS

33. Whenever, under the terms of this Agreement, notice is required to be given or a document sent by one Party to another, it shall be directed to the individuals at the addresses

specified below.

As to EPA

Andrew Warren
Assistant Regional Counsel
U.S. EPA
77 West Jackson Boulevard
Mail Code CS-29A
Chicago, Illinois 60604-3590

As to Settling Respondent

Robert Rafson
Wabansia Corporation
1684 North Ada Street
Chicago, Illinois 60622

XVI. EFFECTIVE DATE

34. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Respondent that EPA has fully executed the Agreement after review of and response to any public comments received; provided that this Agreement shall become null and void and have no effect in the event that Settling Respondent does not acquire title to the Site Property within one hundred eighty (180) days from the effective date, or such other time as the Parties may concur in writing.

XVII. ATTORNEY GENERAL APPROVAL

35. The Attorney General of the United States or her designee has issued prior written approval of the settlement embodied in this Agreement.

XVIII. TERMINATION

36. If any Party believes that any or all of the obligations under Section V (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the

requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

XIX. CONTRIBUTION PROTECTION

37. With regard to claims for contribution against Settling Respondent, its lessees or sublessees, and subsequent assignees, transferees, lessees, and sublessees, the Parties hereto agree that the Settling Respondent and such assignees, transferees, lessees, and sublessees are entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are: (i) all response actions taken and response costs incurred by the United States or any other person with respect to the Site prior to the effective date of this Agreement; and (ii) all response actions to be taken and response costs to be incurred by the United States or any other person with respect to any Existing Contamination after the effective date of this Agreement.

38. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States in writing no later than sixty (60) days prior to the initiation of such suit or claim.

39. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States within ten (10) days of service of the complaint on them.

XX. EXHIBITS

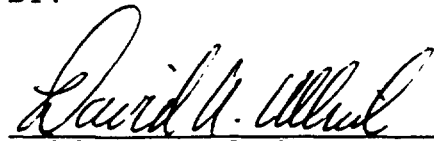
40. Exhibit 1 shall mean the legal description of the Site Property.

XXI. PUBLIC COMMENT

41. This Agreement shall be subject to a thirty-day public comment period and a public meeting, if requested, pursuant to Section 7003(d) of RCRA, 42 U.S.C. § 6973(d). EPA may withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY


BY:


Valdas V. Adamkus
Regional Administrator

5/16/96
Date

WABANSIA CORPORATION

BY:


Robert Rafson

3/14/96
Date

EXHIBIT 1

Lots 7, 8 and 9 in Block 3 in the Subdivision by Chicago Land Company of Block 18 and other property in Sheffields Addition to Chicago in the South West 1/4 of Section 32, Township 40 North, Range 14, East of the Third Principal Meridian, in Cook County, Illinois. PIN #14-32-316-014-0000 and #14-32-316-029-0000.